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AN AMERICAN CIVIL LAW RESPONSE TO INTERNATIONAL TERROR

JEROME L. SKINNER*

I. TIMES OF INCREASING RISK

TERROR AND AIRCRAFT have become synonymous. Terrorist acts against commercial aircraft have some appealing and appalling characteristics that make them desirable as acts of political and ideological assault. They involve large numbers of innocents, they are public and newsworthy, and they spread fear and confusion throughout the western world, which depends upon the commercial air system for so much. These acts did not begin in September of 2001. Unfortunately, they have not ended with the World Trade Center attacks either. Recent attempts—from shoe bombings to hijackings—have underscored the vulnerability that the system still struggles to overcome. However, new political and legal measures exist that will help reduce the risks and that will call upon the most creative remedies available to civil litigators.

Following the devastating disaster of September 11, 2001, President George W. Bush declared, "We will not only deal with those who dare attack America, we will deal with those who harbor them and feed them and house them."¹ Referring to the hijacked passenger jetliners that flew into each of New York

* This paper and its presentation at the 2004 SMU Aviation Symposium are dedicated to Lee Kreindler, who passed from our presence in January, 2003. Lee's patience and optimism were in large part responsible for the historic Pan Am 103 litigation settlement with the Libyan state. Thank you, Lee. Your spirit and leadership will be missed by the aviation bar.

Much of the information in this paper was taken from the author's personal experience with terrorism cases. The author served on the Steering Committee for the Plaintiffs in the Lockerbie Disaster Litigation. He has also served on steering committees for litigation arising from the following air disasters: United States Air Force Flight CT-43; TWA Flight 800, Swiss Air Flight III, Egypt Air Flight 990, and the Reconstituted Committee of Northwest Flight 225. He also represents plaintiffs in the World Trade Center Litigation.

¹ Evan Thomas et al., *Bush: We're at War*, NEWSWEEK, Sept. 24, 2001, at 29.

City's World Trade Center towers and the Pentagon in Virginia, President Bush vowed that the United States would make no distinction between those who carried out the hijackings and those who supported them.²

Few acts are more egregious than countries utilizing their vast power and resources to finance and sponsor acts of terrorism, such as hijackings, kidnappings, bombings, extrajudicial killings, or military attacks directed at innocent citizens. During the past several decades, and especially in recent years, the number of terrorist acts directed at American citizens traveling abroad—citizens who were merely in the wrong place at the wrong time—has been on the rise. Many of these acts have been perpetrated by individuals or groups who are sponsored, directed, supported, or funded, in whole or in part, by foreign governments. Most of us can remember the 1979 Iranian hostage crisis, where terrorists supported by the Khomeni government in Iran seized the United States embassy in Tehran and held fifty-two Americans hostage for 444 days.

In the last twenty years, state-sponsored terrorism involving gross violations of human rights, such as kidnappings, torture, murder, hijackings and suicide bombings in which American citizens have been injured or killed has increased. Many of these terrorist events involve violent actions against commercial aircrafts and passengers or the use of a commercial aircraft as a political statement. In either case, serious injuries and deaths have occurred in large numbers. A few examples of the many aviation-related incidents include:

1. 1958-The first Cuba to U.S. hijacking occurred.³
2. 1960-The first U.S. to Cuba hijacking occurred.⁴
3. 1968-The first Arab-Israeli hijacking occurred, when three members of Popular Front for the Liberation of Palestine (PFLP) hijacked an El Al plane to Rome.⁵ Diverting to Algiers, the negotiations extended over forty days.⁶ Both the hijackers and the hostages went free.⁷

² Serge Schmemmann, *President Vows to Exact Punishment for "Evil,"* N.Y. TIMES, Sept. 12, 2001, at A1.

³ *Aircraft Hijacking* at <http://encyclopedia.thefreedictionary.com/aircraft%20hijacking> (last visited 11/14/04) [hereinafter *Aircraft Hijacking*]; see also *Aviation Security* at http://www.centennialofflight.gov/essay/Government_Role/security/POL18.htm (last visited on Nov. 14, 2004) [hereinafter *Aviation Security*].

⁴ *Aircraft Hijacking*, *supra* note 3.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

4. 1973-Pan Am 747, Rome, Italy: While the aircraft was at the gate loading passengers, a group of terrorists shot at the plane and threw incendiary grenades into the aircraft, killing 30 people.⁸
5. 1976-The Palestinian hijack of the Air France Flight 193 airliner was brought to an end at Entebbe Airport, Uganda by Operation Entebbe.⁹ Israeli commandos assaulted the building holding the hijackers and hostages.¹⁰ They killed all the Palestinian hijackers and freed 105 mostly-Israeli hostages.¹¹ Three passengers and one commando were killed.¹²
6. 1981-A Pakistan International Airlines jet was hijacked and taken to Kabul, where one passenger was killed before the plane flew on to Damascus.¹³ The hostages were finally released after thirteen days when the Pakistani government agreed to free fifty political prisoners.¹⁴
7. 1985-Palestinians took an EgyptAir plane and flew it to Malta. Fifty-nine people died when Egyptian commandos stormed the aircraft.¹⁵
8. 1986-After a sixteen hour siege, twenty-two people were killed when Pakistani security forces stormed a Pan Am flight carrying 400 passengers and crew at Karachi.¹⁶
9. 1990-Hijackers seized a plane from the People's Republic of China, which later crashed as it tried to land in Canton, killing 128 people.¹⁷
10. 1996-Ethiopian Airways Flight 961 crashed into the Indian Ocean near a beach in the Comoros Islands after hijackers refused to allow the pilot to land and refuel the plane. One hundred twenty-five passengers died and fifty survived.¹⁸
11. 1999-Kashmiri militants hijacked an Indian Airlines aircraft and diverted it to Kandahar.¹⁹ After a week-long stand-off, India agreed to release three jailed Kashmiri militants in ex-

⁸ *Pan Am Website* at <http://www.panamair.org/Accidents/celestial.htm> (last visited Nov. 14, 2004).

⁹ *Aircraft Hijacking*, *supra* note 3.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

change for the hostages.²⁰ One hostage was shot dead and his body thrown on the tarmac as a "warning attack."²¹

12. 2001-The September 11 Terrorist Attack occurred.²²

As illustrated by these tragic examples, United States citizens have been prime targets for acts of state-sponsored terror for decades. Many of these attacks on United States citizens have involved commercial air transportation. For almost a century and a half, foreign governments and their agents have enjoyed broad common law and statutory immunity from criminal prosecution and from civil lawsuits under international law.

This article will discuss the civil remedies enacted by Congress in the mid-1990s to fill the gap in international law related to the previously untouchable state sponsors of terrorism, the results of some of the lawsuits brought under the Antiterrorism Act, and some practical considerations for litigators.

II. BREAKTHROUGH LITIGATION

In recent years, three cases have been in the forefront as the American civil law system responded to the horrendous attacks that state-sponsored terror has made upon American citizens. Two of the three cases involved the destruction of commercial aircraft and the multiple deaths of American citizens. The third related to the non-aviation death of a single American, but the precedent will impact future legal actions arising out of airborne terror.

The first, Pan Am 103, known as the "Lockerbie" bombing, was the original action against a foreign sovereign for a terrorist act.²³ A bomb placed in the 747 cargo hold through inter-line baggage exploded at altitude and killed 270 individuals in the air and on the ground. Civil litigation was brought in several United States District Courts and consolidated in the Eastern District of New York. After six years of litigation and numerous delays, negotiations with the state of Libya culminated in a \$2.7 billion settlement in the Fall of 2003.

The second, the WTC Litigation arising out of the September 11 terrorist attacks in New York and Washington, has survived early appellate proceedings and is moving ahead in numerous

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ The author served on the Plaintiffs' Steering Committee for this litigation and the following comes from his personal knowledge.

multi-party actions against terrorist organizations, individual defendants, and sovereign states.²⁴ Recent disclosures appear to support the financial and ideological ties between sovereign states such as Iraq and Saudi Arabia and the terrorist group al Qaeda.²⁵ These developments will not only be important from the standpoint of liability, but they will also increase the likelihood of recovering damages from a financially responsible party.

Third, the litigation brought by the family of David Boim, for his death in a Jerusalem street bombing, raises the possibility of suits against second-tier defendants who raise funds in the United States to support terrorist acts abroad.²⁶ This has significant ramifications for airline related terror and the civil legal system's ability to seek redress that will financially limit future acts.

In 1999, the United Nations General Assembly adopted the International Convention for the Suppression of the Financing of Terrorism.²⁷ The Convention requires its signatories to criminalize certain acts and to establish jurisdiction over individuals and organizations financing terrorist activities, and to extradite or subject such persons to prosecution.²⁸ However, there are no provisions that address nation-states that provide most of the funding for the individual terrorists and terrorist organizations. That has been left for the United States Congress, and in a way, for the practicing aviation bar.

III. THE RIGHT TO SUE: EXCEPTIONS TO THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

The Foreign Sovereign Immunities Act²⁹ ("FSIA") sets forth the general rule that foreign states are immune from the jurisdiction of both federal and state courts in the United States. This act was passed as a matter of diplomatic courtesy, subject to certain stated exceptions. Until 1996, when significant amendments were made to the FSIA, foreign countries could only be

²⁴ The author also represents plaintiffs in the WTC litigation.

²⁵ STEPHEN F. HAYES, *THE CONNECTION* (2004); 9/11 COMMISSION REPORT 61-66 (2004).

²⁶ *Boim v. Quaranic Literacy Inst. & Holy Land Foundation for Relief & Dev't*, 291 F.3d 1000 (7th Cir. 2002).

²⁷ International Convention for the Suppression of Financing of Terrorism, G.A. Res. 109, U.N. GAOR, 54th Sess., UN. Doc. A/Res/54/109 (2001).

²⁸ See generally *id.*; see 28 U.S.C. § 2339; *Boim*, 291 F.3d at 1012-13.

²⁹ 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1441(d), 1602-1611 (2004).

prosecuted for tortious acts committed within the territory of the United States.³⁰ In 1996, the Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996 was signed into law.³¹ Congress added state sponsorship of terrorism to the list of exceptions covered under the FSIA.³² Another significant modification expanded the right of plaintiffs to attach *any* property of a foreign country, regardless of whether the property was involved in the claim.³³

The terrorism exception to the FSIA³⁴ allows civil suits for monetary damages in U.S. courts for "act[s] of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such [acts] if . . . engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency."³⁵ The routine provision of financial assistance to a terrorist group in support of its terrorist activities has been held to constitute "providing material support or resources" for a terrorist act, regardless of whether the material support or resources contributed directly to the act from which a particular claim arises.³⁶ However, only countries formally designated by the State Department as state sponsors of terrorism may be sued.³⁷

The requirements for a cause of action under this amendment are:

1. the claimant or victim must be a U.S. citizen or national at the time the act was committed;
2. the claim must be brought against a nation that has been designated as a state sponsor of terrorism by the U.S. State Department at the time the act was committed; and

³⁰ See Lisa D. Goekjian, *Jurisdiction Over Iran Under the FSIA and the Algiers Accord, a Loose Application: Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 59 GEO. WASH. L. REV. 1311, 1315 (1991) (citing 28 U.S.C. § 1603(d)).

³¹ The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(a) 110 Stat. 1241 (April 24, 1996) (codified at 28 U.S.C. § 1605(a)).

³² 28 U.S.C. § 1605(a)(7).

³³ *Id.* § 1605(a)(6)-(7).

³⁴ *Id.* § 1605(a).

³⁵ *Id.* § 1605(a)(7).

³⁶ *Boim v. Quaranic Literacy Inst. & Holy Land Foundation for Relief & Dev't*, 291 F.3d 1000, 1027 (7th Cir. 2002).

³⁷ The list can be found under either the Export Administration Act of 1979 § 6(j), 50 App. U.S.C. § 2405 (j), or the Foreign Assistance Act of 1961 § 620(A), 22 U.S.C. § 2371.

3. the claimant has afforded the defendant state a reasonable opportunity to arbitrate if the act occurred within the borders of the defendant state.³⁸

The terrorist exception also contains a provision that allows a claimant suing under the terrorist exception to execute a judgment against state-owned property used for a commercial activity within the United States, regardless of whether the property was involved in the act upon which the claim is based.³⁹ Today, the only allowable bases for subject matter and personal jurisdiction in an action against a foreign state defendant in U.S. courts remain the FSIA's enumerated exceptions to immunity.

IV. SUITS FOR ACTS COMMITTED IN FOREIGN STATES: ANTI-TERRORISM ACT OF 1990, AS AMENDED, 18 U.S.C. § 2333

Title 18 U.S.C. was amended in 1996 to add § 2333, which allows U.S. nationals who have been injured "by reason of an act of international terrorism" to sue and recover treble damages and punitive damages. Although proof of a criminal violation (under 18 U.S.C. §§ 2339A and 2339B) might satisfy the definition of international terrorism under § 2333, such proof is not necessary to sustain a § 2333 claim.

Since the time of its enactment, several judgments have been rendered against Cuba and Iran, and other suits have been filed against Iraq, Libya, and Syria, which include the following cases.

A. *ALEJANDRE V. REPUBLIC OF CUBA*⁴⁰

On February 24, 1996, the Cuban air force shot down two unarmed U.S. civilian aircraft over international waters, killing all four occupants.⁴¹ Three of those victims were U.S. nationals.⁴² In 1997, the families of the three U.S. victims obtained a judgment against Cuba for approximately \$187.6 million in compensatory and punitive damages.⁴³ Cuba did not appear in the case.⁴⁴

³⁸ 28 U.S.C. § 1605(a)(7).

³⁹ *Id.* §§ 1610(a)(7), (b)(2).

⁴⁰ *Alejandro v. Republic of Cuba*, 996 F. Supp. 1239, 1242, 1253 (S.D. Fla. 1997).

⁴¹ *Id.* at 1242.

⁴² *Id.*

⁴³ *Id.* at 1253.

⁴⁴ *Id.* at 1242.

B. *FLATOW V. ISLAMIC REPUBLIC OF IRAN*⁴⁵

On April 9, 1995, a suicide bomber drove a van loaded with explosives into a bus passing through the Gaza strip, killing seven Israeli soldiers and one U.S. national—Alisa Michelle Flatow—a twenty-year-old college student spending a semester abroad in Israel.⁴⁶ A terrorist group, the Shafaqi faction of Palestine Islamic Jihad, which was funded by the government of Iran, claimed responsibility for the explosion.⁴⁷ On March 11, 1998, the family of Miss Flatow obtained a judgment in U.S. court against Iran for \$247 million in compensatory and punitive damages.⁴⁸ Iran denied the allegations but did not appear either in this case or in the cases described below.

C. *CICIPPIO V. ISLAMIC REPUBLIC OF IRAN*⁴⁹

Two U.S. nationals associated with the American University of Beirut, and a third U.S. national who operated two private schools in Beirut, were kidnapped in May 1985 in Lebanon by the Hezbollah, a group receiving material support from the government of Iran.⁵⁰ The three men were imprisoned in extreme conditions and tortured until their release, ranging from one and a half years to five years and three months.⁵¹ On August 27, 1998, the three U.S. nationals, along with two of their spouses, obtained a judgment against Iran for \$65 million in compensatory damages.⁵²

D. *ANDERSON V. ISLAMIC REPUBLIC OF IRAN*⁵³

On March 16, 1985, Terry Anderson, a U.S. journalist working in Beirut, was kidnapped and beaten for six and a half years by the Hezbollah.⁵⁴ He was released in December 1991 and reunited with his wife and daughter.⁵⁵ On March 24, 2000, Ander-

⁴⁵ 999 F. Supp. 1, 5 (D.D.C. 1998).

⁴⁶ *Id.* at 7.

⁴⁷ *Id.* at 8.

⁴⁸ *Id.* at 1.

⁴⁹ 18 F. Supp. 2d 62, 64, 70 (D.D.C. 1998).

⁵⁰ *Id.* at 64.

⁵¹ *Id.*

⁵² *Id.* at 62.

⁵³ 90 F. Supp. 2d 107, 114 (D.D.C. 2000).

⁵⁴ *Id.* at 108.

⁵⁵ *Id.*

son obtained a judgment against Iran for \$340 million in compensatory and punitive damages.⁵⁶

E. *EISENFELD V. ISLAMIC REPUBLIC OF IRAN*⁵⁷

On February 25, 1996, two U.S. citizens, Matthew Eisenfeld and Sara Rachel Duker, were killed in Israel by a bomb placed on a bus by the militant Palestinian organization Hamas, which was funded by the government of Iran.⁵⁸ On July 11, 2000, the families of the victims obtained a judgment against Iran for \$327 million in compensatory and punitive damages.⁵⁹

F. *HIGGINS V. ISLAMIC REPUBLIC OF IRAN*⁶⁰

In June 1987, a U.S. marine colonel, William R. Higgins, was working unarmed in Lebanon as part of a United Nations peacekeeping mission.⁶¹ On February 17, 1988, Higgins was kidnapped from his vehicle by the Hezbollah and then held for eighteen months, during which time he became emaciated and listless.⁶² On July 31, 1989, the Hezbollah released a videotape of Higgins hanging by the neck.⁶³ Two years later, his body was released and returned to the United States.⁶⁴ An autopsy showed that the death was a homicide, that it likely occurred before the hanging, and that various parts of his body (including the genitalia) had been mutilated.⁶⁵

In 1999, Colonel Higgins' wife filed suit against Iran and the Islamic Revolutionary Guard. The district court issued an award of over \$55 million in compensatory damages jointly against the defendants and an award of \$300 million in punitive damages against the Islamic Revolutionary Guard.⁶⁶

⁵⁶ *Id.* at 107.

⁵⁷ 172 F. Supp. 2d 1, 10, 11 (D.D.C. 2000).

⁵⁸ *Id.* at 4.

⁵⁹ *Id.* at 1.

⁶⁰ No. 1:99CV00377, 2000 WL 33674311, *1-3, 8-9 (D.D.C. Sept. 20, 2000).

⁶¹ *Id.* at *1.

⁶² *Id.* at *2.

⁶³ *Id.* at *3.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at *9.

G. *SMITH V. SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA*⁶⁷

I represented several of the plaintiffs and served on the plaintiffs' steering committee in this tragic case, which you have undoubtedly heard about and read about. On December 21, 1988, Pan Am Flight 103 exploded over Lockerbie, Scotland, killing all 259 persons aboard and 11 on the ground.⁶⁸ Following criminal indictments against two Libyan men in the United States and the United Kingdom, some of the relatives of the victims filed suit in U.S. federal court in 1994 against Libya, the Libyan External Security Organization, the Libyan Arab Airlines, and the individuals named in the criminal indictments.⁶⁹ Appearing in court, Libya filed a motion to dismiss for lack of subject matter jurisdiction, on grounds that there was no applicable exception to its immunity under the FSIA. The district court granted the motion and dismissed the case.⁷⁰

After the 1996 amendment of the FSIA created a new exception to immunity in the case of suits against terrorist states, more relatives of the victims re-filed essentially the same claims that had previously been dismissed.⁷¹ The district court denied defendants' new motion to dismiss under the new FSIA exception to immunity.⁷² Settlement negotiations over the last two-and-a-half years have resulted in a \$2.7 billion recovery for the Pan Am plaintiffs.

H. *DALIBERTI V. REPUBLIC OF IRAQ*⁷³

Four U.S. nationals claim that the government of Iraq arrested, detained, and tortured them in 1992 in Kuwait.⁷⁴ They were held in total darkness from four to eleven days without water, a toilet, a bed, or adequate medical attention.⁷⁵ Proceedings in this case are ongoing.

⁶⁷ *Smith v. Socialist People's Libyan Arab Jamahiriya*, 886 F. Supp. 306, 308, 309, 315 (E.D.N.Y. 1995), *aff'd* 101 F.3d 239 (2d Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997).

⁶⁸ *Id.* at 309.

⁶⁹ *Id.* at 308-09.

⁷⁰ *Id.* at 309.

⁷¹ *Rein v. Socialist People's Libyan Arab Jamahiriya*, 995 F. Supp. 325 (E.D.N.Y. 1998).

⁷² *Id.* at 329, 332 (citing 28 U.S.C. § 1605(a)(7)).

⁷³ 97 F. Supp. 2d 38 (D.D.C. 2000).

⁷⁴ *Id.* at 41.

⁷⁵ *Id.*

I. WEINSTEIN⁷⁶

A U.S. national working in Israel as a butcher was killed in 1996 by a bomb attack on a bus in Jerusalem. The attack was allegedly committed by Hamas.⁷⁷ On August 1, 2000, the family of the victim filed suit in a state court of New York against the government of Syria, claiming that it provided material support—including training, communications, and financial assistance—for Hamas to carry out the bombing.⁷⁸ Syria denied the allegations.⁷⁹ Proceedings in this case are ongoing.

V. THE RIGHT TO COLLECT: THE
FLATOW AMENDMENT

“The Antiterrorism Act merely waived the sovereign immunity of state sponsors of terrorism. To create a cause of action for victims of terrorism, Congress enacted a separate piece of legislation.”⁸⁰ This piece of legislation was the Civil Liability for Acts of State Sponsored Terrorism Act.⁸¹

This Act, known as the Flatow Amendment, allows for the recovery of non-economic harms, such as mental anguish, bereavement and grief, damages for pain and suffering, as well as the award of punitive damages against an “official, employee, or agent” of a foreign state designated as a state sponsor of terrorism.⁸² Several courts have used this to establish joint and several liability for states through the doctrines of respondeat superior and vicarious liability.⁸³ Congress explicitly made the statute retroactively applicable to pre-enactment conduct.⁸⁴

⁷⁶ See Judith Miller, *Syria is Sued by Family of Man Killed by '96 Bomb in Jerusalem*, N.Y. TIMES, Aug. 2, 2000, at A6.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Elahi v. Islamic Republic of Iran*, 124 F. Supp. 2d 97, 106 (D.D.C. 2000).

⁸¹ Civil Liability for Acts of State Sponsored Terrorism, 28 U.S.C. § 1605(a)(7) (2004).

⁸² *Elhai*, 124 F. Supp. 2d at 106.

⁸³ *Dalberty v. Republic of Iraq*, 146 F. Supp. 2d 19 (D.D.C. 2001); *Higgins v. Islamic Republic of Iran*, No. 1:99CV00377, 2000 WL 33674311, at *8 (D.D.C. Sept. 21, 2000); *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62 (D.D.C. 1998).

⁸⁴ 28 U.S.C. § 1605(a)(7).

VI. CONSPIRACY LIABILITY—RECENT SIGNIFICANT CASE LAW

In a significant and lengthy opinion decided last summer, the court in *Boim v. Quranic Literacy Institute* held that aiding and abetting acts of terrorism gives rise to civil liability under 18 U.S.C. § 2333.⁸⁵ The plaintiffs in *Boim* sought to hold organizations civilly liable for funding a terrorist organization that murdered their son.⁸⁶ In upholding the district court's refusal to dismiss the case, the appellate court held that the First Amendment right of association is not offended as long as the defendants knew about the organization's illegal activity, desired to help that activity succeed, and engaged in some sort of helping.⁸⁷ Membership alone in a terrorist organization is not illegal.⁸⁸ Funding a terrorist organization is illegal.⁸⁹

Though the plaintiffs in *Boim* could find no case law supporting their position that the defendant organizations may be held civilly liable under 18 U.S.C. § 2333 for aiding and abetting an act of international terrorism, the plaintiffs urged the court to find that aiding and abetting is conduct that "involves" a violent act as that word is used in § 2331(1).⁹⁰ The defendants contended that § 2333 does not provide for aiding and abetting liability, and relying on a U.S. Supreme Court case, maintained that aiding and abetting liability is available only when a statute expressly provides for it.⁹¹ The *Boim* court noted that failing to extend § 2333 liability to aiders and abettors would be contrary to Congress' stated purpose of cutting off the flow of money to terrorists at every point along the chain of causation.⁹² The court noted that "there would be no trigger to pull, or bomb to blow up, without the resources to acquire such tools of terrorism

⁸⁵ 291 F.3d 1000, 1028 (7th Cir. 2002).

⁸⁶ *Id.* at 1001.

⁸⁷ *Id.* at 1028.

⁸⁸ Membership for U.S. citizens is not illegal. *Id.* at 1023 (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982)). However, under the PATRIOT Act, non-U.S. nationals may be expelled from this country for membership in a terrorist organization. PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), 8 U.S.C. § 1226a (a)(5).

⁸⁹ 8 U.S.C. § 1182(a)(3)(B)(iii).

⁹⁰ *Boim*, 291 F.3d at 1012.

⁹¹ *Id.* at 1005 (citing *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994)).

⁹² *Id.* at 1015.

and to bankroll the persons who actually commit the violence."⁹³

VII. PRACTICAL CONSIDERATIONS

A. SERVICE OF PROCESS ON FOREIGN STATE OR THE AGENT OF A FOREIGN STATE

Each party to the Hague Service Convention designates a Central Authority to whom a request for service is to be sent.⁹⁴ The Central Authority in the United States is the Foreign Litigation Section of the Civil Division of the U.S. Department of Justice. The requesting authority must be a court.

The requesting authority is to send two copies of the proposed service to the appropriate Central Authority—one for the records of the Central Authority and one to be served. The forms must be completed in English or in French, or in the official language of the receiving state.⁹⁵

B. COOPERATION WITH CRIMINAL AUTHORITIES

The criminal authorities prosecuting cases such as the criminal actions arising out of Pan Am 103 or the LaBelle nightclub bombing in West Berlin, Germany,⁹⁶ can prove to be a useful source of information and evidence in civil litigation against the terrorists. The experience of those plaintiffs who have pursued civil litigation against defendants who are also charged with criminal acts of terrorism has been that the governmental authorities are willing to share vast amounts of information once the criminal proceedings are complete. Considerations relating to national security and agreements made to protect the identity of witnesses can normally be negotiated with criminal authorities and with the sources involved.

C. NEGOTIATING A SETTLEMENT

Bringing a terrorist defendant to the settlement table is extremely difficult and requires great patience. If the means of service of process provided by the various authorizing statutes,

⁹³ *Id.* at 1021.

⁹⁴ Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 (ratified by the United States, Feb. 10, 1969) [hereinafter Hague Service Convention].

⁹⁵ *Id.* art. 7.

⁹⁶ See *Berlin Disco Bomb Verdict Due* at <http://www.cnn.com/2001/WORLD/europe/11/12/germany.disco> (last visited Nov. 14, 2004).

including the use of the Secretary of State or the United States Justice Department are followed, then jurisdiction is assured. Even foreign states and terrorist organizations are fearful of large judgments pending in the United States courts. Consequently, a foreign state such as Libya may seek to settle a civil action in order to forego the loss of its national assets and to relieve other pressures placed on the state by the international community or the United Nations. Important factors will be patience, cultural sensitivity, and a very thick skin to the accusations, innuendos, and angry outbursts against the United States and its lawyers.

D. COLLECTING A JUDGMENT

The results have been very inconsistent and frustrating for many plaintiffs. The criminal authorities that have provided assistance in obtaining evidence to be utilized in a civil case may be the same authority that will oppose the collection of a judgment from frozen assets. The best way to ensure that this is not a problem is to maintain a close working relationship with the U.S. Justice Department throughout civil proceedings. This is still a political process; civil litigation against a foreign state includes considerations that are beyond those of the litigants. A close relationship gives you insight into those considerations and can help you include them in the structure of any settlement process.

VIII. CIVIL TERROR SUITS—WE CAN MANAGE THEM AND IT CAN BE WORTHWHILE

At the outset of this discussion, the following question was asked: "Are recoveries practical and will they substantially damage the terrorists while proving worthwhile in a business or other important sense?" The answer is an overwhelming yes. Consider the following concerning the "world-wide terrorist enterprise":⁹⁷

—Terror is a political and ideological statement. Such statements cost vast amounts of money.

—Armed groups transcend nation-states and lack the legitimate means of raising funds that nation-states follow.

⁹⁷ The following factors come from LORETTA NAPOLEONI, *MODERN JIHAD: TRACING THE DOLLARS BEHIND THE TERROR NETWORKS* 63–128, 158–165, 188–202 (2003).

—State sponsorship fills some of the terror funding void and usually takes one of two forms: weak states host training sites and provide shelter; strong states pay for terror directly.

—Funding may also arise from corporate institutions and individuals. Terror has become big business.

—Terrorist organizations have their own state supports, institutions for information and recruitment, banking and financial networks, and legitimate for-profit businesses and charities.

—In the West there has been an increasing “Islamist Colonization” in institutional economies with terror funding and laundering operations in holding companies, construction companies, forestry interests, agricultural conglomerates, import/export companies, fishing companies, real estate holdings, wood and paper companies, charities, banks, and more.

An excellent example of this phenomenon is the Hamas American support system. In the United States, the Hamas recruited at open conferences in Midwest cities such as Omaha and Kansas City.⁹⁸ The Hamas operated in the United States through banks, finance companies, real estate holdings, automobile dealerships and charities. Organizations such as the Holy Land Foundation, the United Association for Studies and Research (UASR), the Islamic Association for Palestine, and others raised funds for “humanitarian” activities without paying U.S. taxes.⁹⁹ Tens of millions of dollars were funneled to the Hamas through this effective system of technology, legal structure, and legitimate business.¹⁰⁰ Many of these “second-tier” organizations have never been civilly sued.¹⁰¹ This is just one example. The stakes are high and so are the finances.

How high? Estimates range between \$600 billion and \$1.5 trillion for the value of the underground terror economy,¹⁰² which is more than 5% of the total legitimate world economy.¹⁰³ This exceeds the GDP of the United Kingdom and most of the world’s smaller national economies.¹⁰⁴ Finally, many legitimate governments and corporations regularly do business with the

⁹⁸ STEVEN EMERSON, *AMERICAN JIHAD: THE TERRORISTS LIVING AMONG US* 158 (2002).

⁹⁹ *Id.* at 160.

¹⁰⁰ *Id.* at 161–62.

¹⁰¹ *Id.* at 159.

¹⁰² NAPOLEONI, *supra* note 97, at 198.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

underground terrorist economy, increasing its wealth on an ever-growing basis.¹⁰⁵

Consequently, new laws have created causes of action and jurisdictional devices, while violent terrorist acts are funded by nation-states, terrorist organizations, business, individuals and charities. As a result, we now have potentially culpable parties, jurisdictional bases and enormous and collectable damages. By using legitimate business forms and institutionally-based fund raising, the terrorists have brought themselves within the reach of the civil laws. Are we up to the challenge? We can limit their ability to take life and sow terror. Will we?

IX. ISSUES FOR CONSIDERATION—AIRPLANES AND TERROR

Aviation and terror are tragically related. Political and ideological terror has become synonymous with commercial aviation. Since the first large-scale hijacking involving El Al's Rome—Tel Aviv flight in 1968, and the death of thirty passengers onboard a Pan Am 747 in 1973, there have been as many hijackings, attempted hijackings, bombings, shootings and airport attacks as there have been major death-causing accidents among commercial airlines. Recent lawsuits brought as a result of the September 11 hijackings, the Pam Am 103 bombing, and numerous individual terrorist acts have raised the following questions for the aviation bar:

1. Does the law provide adequate civil means to redress or deter terrorist acts involving commercial aviation?
2. Can we anticipate future events that will permit civil law responses and the passing of laws to impact the threat?
3. Are recoveries that will damage the ability of terrorist organizations and states realistic and worthwhile?
4. How can aviation attorneys conquer the obstacles, master the practicalities, stay alive and contribute to making the skies safer for air travel?

It is a new millennium. We are beset by many of the same old enemies and fears. We can expect trouble. Nevertheless, we have new tools, and we can choose to use our knowledge and expertise to conquer defendants who truly are "bad guys."

¹⁰⁵ *Id.*